No. 89-538

In the Supreme Court of the United States

OCTOBER TERM, 1989

EDNA EMERSON LITTLEWOLF, ET AL., PETITIONERS

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
RICHARD B. STEWART
Assistant Attorney General
ROBERT L. KLARQUIST
EDWARD J. PASSARELLI
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the White Earth Reservation Land Settlement Act, 25 U.S.C. 331 note (Supp. V 1987), by limiting the time in which certain Indian land claims may be made against third parties, establishing statutory compensation for those claims in the alternative, and providing a Tucker Act remedy for claimants dissatisfied with the statutory compensation, on its face takes petitioners' property without just compensation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 877 F.2d 1058. The opinion of the district court (Pet. App. A15-A46) is reported at 681 F. Supp. 929.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1989. The petition for a writ of certiorari was filed on September 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners brought this action as a class seeking an injunction and order declaring the White Earth Reservation

Land Settlement Act of 1985 (WELSA), Pub. L. No. 99-264, 100 Stat. 61, unconstitutional. WELSA is intended to resolve fifty-year-old claims to former Indian allotments on the White Earth Reservation by imposing a statute of limitations on the filing of suits by Indian claimants for title or damages, retroactively ratifying past transfers of these allotments once the limitations period has expired, and providing for compensation of all eligible claimants who have elected not to file suit for title or damages.

1. Pursuant to the Treaty of March 19, 1867, 16 Stat. 719, the United States established the White Earth Reservation, consisting of approximately 830,000 acres in northwestern Minnesota, for the benefit of certain Chippewa Indians. In the late 1800's and during the first few years of this century, a large portion of the reservation land was allotted to individual Indians through restricted deeds of trust. Pet. App. A3. In 1906, however, Congress passed the Clapp Amendment (Act of June 21, 1906), ch. 3504, 34 Stat. 353, as amended by the Act of March 1, 1907, ch. 2285, 34 Stat. 1034, removing restrictions on allotments held by adult mixed-blood Indians, and authorizing the granting of fee simple title to adult mixed-blood and, in certain circumstances, to full-blood Indians. As a result, many of the allotments passed into non-Indian possession. Pet. App. A3-A4.

In 1979, the Secretary of the Interior, relying in part upon a decision of the Minnesota Supreme Court, *State* v. *Zay Zah*, 259 N.W.2d 580 (1977), cert. denied, 436 U.S. 917 (1978), which held that the Clapp Amendment could not unilaterally abrogate the trust status of a White Earth allotment, determined that the transactions which led to many of the alleged terminations of the allottees' interests had been made in violation of the trust deed restrictions and that the purported conveyances were, therefore, in-

effective. Pet. App. A5. The effect of *Zay Zah* and the Secretary's determination was to cloud title to more than 100,000 acres, resulting in "social and economic chaos." Pet. App. A5-A6.

2. In 1986, Congress acted to settle permanently the "unresolved legal uncertainties" concerning title to the allotted reservation lands by enacting WELSA. 25 U.S.C. 331 note (Section 2(6)) (Supp. V 1987). The Act limits the time in which Indian allottees and their heirs may bring claims: Section 6(c) provides that "any action in any court to recover title or damages" with respect to the alleged invalid conveyances "shall be forever barred" unless brought within 180 days of the date of the enactment of WELSA or prior to the Secretary's certificaton of certain described events, whichever occurs later.[1] The Secretary's certification occurred on March 21, 1988, approximately two years after WELSA's enactment, thus barring further suits against third parties. See Pet. App. A7.

In the alternative, the Act allows Indian allottees or their heirs to receive compensation for their claims from the United States, in an amount to be determined administratively. Section 8 of the Act, in conjunction with Section 7, directs the Secretary to investigate the White Earth allotments, ascertain which ones wrongfully passed from the allottees' possession, and then determine compensation based upon the fair market value as of the date of the alleged invalid transaction, plus interest. The respective

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[1] WELSA required the Secretary to certify, by publication in the Federal Register, that certain conditions required by Section 10 of WELSA had been fulfilled. Those conditions include the donation by the State of Minnesota of 10,000 acres of land to be held in trust for the Chippewa Indians, an appropriation by the State of $500,000 to assist in the settlement provided for in WELSA, and an appropriation by the United States of $6,600,000 for economic development to benefit the White Earth Band of the Chippewa Indians.

allottee or heirs then have 180 days following written notification of the Secretary's determination in which to seek judicial review of its sufficiency. 25 U.S.C. 331 note (Section 8(d)) (Supp. V 1987). The statutory compensation remedy available under Section 8 is not available to claimants who have timely filed Section 6(d) suits against third parties. 25 U.S.C. 331 note (Section 6(d)) (Supp. V 1987).

Finally, Section 6(d) provides that a claimant may challenge the constitutional adequacy of the statutory compensation that the Secretary determines to be due by filing suit under the Tucker Act, 28 U.S.C. 1491, within 180 days of receiving notice of the Secretary's determination.

In summary, then, the Act provides three different routes by which an allegedly wrongfully dispossessed allottee or heirs may obtain redress. First, each claimant had a period of approximately two years beyond the passage of the Act in which to bring actions against third parties. Second, a claimant is entitled to an administratively determined amount of compensation. Finally, the claimant may reject the administratively determined compensation and instead make a claim under the Tucker Act, within 180 days of the notification of the Secretary's determination.

3. Petitioners are a class of Indians whose claims to the land on the White Earth Reservation have been affected by WELSA.[2] The class brought suit on a number of grounds, including the claim that WELSA violates due process because it provided for an inadequate amount of time to file suit for title and damages. Pet. App. A24.

[2] Included among the named petitioners are many who filed separate suits in district court within the time allowed by WELSA to test title and seek damages. Those suits were found subject to substantial legal defenses resulting in dismissals. *Manypenny* v. *United States*, Civ. No. 4-86-770 (D. Minn. Feb. 16, 1988); *Fineday* v. *United States*, Civ. No. 6-88-18 (D. Minn. Jan. 10, 1989).

Petitioners further argued that WELSA effects a taking of property without just compensation, despite their entitlement to administratively determined compensation and the availability of a Tucker Act remedy. *Ibid.* Petitioners sought injunctive relief and, alternatively, a declaration that the Act is unconstitutional. Pet. App. A16.

4. The district court entered summary judgment on behalf of respondents. Pet. App. A16-A46. Examining Congress's action in light of the government's generalized trust responsibility towards Native Americans, the district court ruled that WELSA's limitations period for filing suit comports with due process requirements, noting that it was "rationally related to the government's legitimate interest in protecting thousands of Indian claimants from the need to litigate thousands of expensive, time-consuming individual actions to recover any compensation for their claims." Pet. App. A26. Hence, the court reasoned, the Act properly implements Congress's valid legislative goals of encouraging either prompt suit by Indian claimants or their receipt of a monetary settlement so as quickly to right the wrong done to the White Earth Band and to clear title to the large land area affected.[3] Pet. App. A26-A29.

The court further held that the imposition of a limitations period on the time to bring suit did not effect a "taking" of the claimants' right to sue because the Act afforded the claimants a reasonable opportunity to bring suit. Pet. App. A36. Nor did WELSA unconstitutionally take claimed interests in land, few of which had been "tested in court" (*ibid.*), because Congress expressly provided a

[3] The district court noted that petitioners had had, in fact, a half century in which to file suit. It explained that the Indians' trust relationship with the United States could excuse them from a defense of laches but did not exempt them from the imposition of a time constraint on their future ability to bring suit. Pet. App. A29-A30.

remedy for the claimants to recover just compensation for any takings. Pet. App. A37. The Act not only established a statutory compensation scheme designed in "good faith * * * to compensate plaintiffs fairly," but also explicitly confirmed the availability of a Tucker Act remedy to challenge the adequacy of the amount of compensation determined by the Secretary to be due. Pet. App. A37-A43.

The district court rejected petitioners' claim that the Act improperly limited the Tucker Act remedy. The court observed that the six-month limitations period on Tucker Act suits is triggered only when a claimant receives the Secretary's determination of the statutory amount of compensation he or she is due, on a date almost certainly more than six years (the normal period allowed for the filing of a Tucker Act suit) after any taking had occurred. Pet. App. A42. In any event, the court ruled, it could not fault Congress's judgment that the six-month limitations period is reasonable under the circumstances. *Ibid.*

5. The court of appeals affirmed. Pet. App. A1-A14. The court found it unnecessary to address the issue whether the time permitted by WELSA for bringing damages or recovery suits against third parties is so inadequate as to offend due process. Assuming that WELSA does effect a taking of rights to recover against third parties, the court of appeals found the statute constitutional nonetheless, because it provides adequate remedies for recovering just compensation. Pet. App. A11-A12. The court agreed with the district court's conclusion that the Act's provision for administrative compensation is a good faith effort to compensate petitioners fairly. Pet. App. A13. It further held that, in any event, the alternative Tucker Act remedy "ensures full compensation in those particular instances where the statutory payment might not adequately compensate claimants." *Ibid.* The court

determined in addition that "under the circumstances of this case," where Congress by enacting WELSA had alerted the White Earth Band members that the Secretary would be investigating claims and determining compensation over the next several years, and where the Secretary is to give notice to potential claimants when a compensation determination has been made, the six-month period for bringing Tucker Act suits is as meaningful as a six-year period without such notice would be. Pet. App. A13-A14.

ARGUMENT

The court of appeals correctly ruled that WELSA expressly ensures constitutionally adequate compensation in the unique factual circumstances presented by petitioners' uncertain claims for title and damages. The court's determination does not conflict with any decision of this Court or any court of appeals. And, because petitioners have a fully adequate remedy for recovering just compensation for any taking arising from the operation of the statute, this case raises no issue of general importance warranting review by this Court.

1. At the outset, petitioners would have this Court review an issue that the court of appeals properly decided not to resolve. Petitioners contend (Pet. 21-28) that the lower court was required to determine whether, in each instance, the administrative compensation provided by Section 8(a) of WELSA will be adequate to satisfy the nature of the property interest they contend was taken, irrespective of the Tucker Act remedy that is also expressly provided by WELSA.

However, determinations related to takings litigation are by nature fact specific. "The inquiry into whether a taking has occurred is essentially an 'ad hoc, factual' inquiry." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005

(1984). Clearly, where a statute, as here, provides for administrative compensation for uncertain legal claims, constitutional sufficiency can be determined only after analyzing the factual and legal basis for each claim and comparing it with the compensation provided. As this Court has repeatedly held, it is inappropriate for a court to render hypothetical views on whether an uncompensated taking has occurred before the claimant has pursued administrative and other remedies that may render that holding unnecessary. See, *e.g.*, *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186-197 (1985); *Ruckelshaus*, 467 U.S. at 1013 & n.16, 1019; *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 94 n.39 (1978).[4]

Further, even if it could be assumed that a given claimant might receive less in administrative compensation than the Constitution demands, it does not follow that WELSA

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[4] Thus, in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 146 (1974), the Court noted in particular that disputes about valuation theories require resolution on a developed factual record that includes evidence of actual figures. As the Court commented there, a record that provides the "confining circumstances of particular situations" can best inform constitutional adjudication. *Ibid.*

Here, the most petitioners can offer is a comparison between a Congressional Budget Office (CBO) estimate and the State of Minnesota's valuation of 10,000 acres to be transferred to the tribe to argue that evidence suggests that Congress intended less than adequate compensation. See Pet. 23-24. But first, the CBO estimate is only an estimate and funding is in no way limited by the estimate. Indeed, there was evidence in the record below that in some instances the compensation formula would yield more than the current value of the properties in question. Golden Affidavit, C.A. App. 726-728. Second, petitioners confuse the market value of their uncertain claims with the market value of the land. Third, petitioners assume, without substantiation, that the properties being transferred by the State of Minnesota are of equivalent value to the land lost by Indian allottees in the early part of the century.

is unconstitutional on its face. Rather, the claim that Section 8(a) is unconstitutional could be made only as applied to that factual situation. See *Members of the City Council* v. *Taxpayers for Vincent,* 466 U.S. 789, 797-798 (1984) ("a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner").

2. Even in that case, the claim would fail because WELSA makes available the "safety net" of a Tucker Act remedy. As the Court made clear in *Ruckelshaus* v. *Monsanto Co.,* 467 U.S. 986, 1019-1020 (1984), and in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 155-156 (1974), the availability of a Tucker Act remedy ensures that no less than the constitutionally required amount of compensation is available. The Tucker Act remedy thus guarantees that there will be no improper "taking," even where an alternative statutory compensation scheme may not suffice to provide just compensation.[5] See *Monsanto,* 467 U.S. at 1018-1019; *Regional Rail Reorganization Act Cases,* 419 U.S. at 155-156.

Here, the Act's express terms and legislative history make clear that Congress intended to provide adequate compensation for any taking that might occur by underscoring the availability of a Tucker Act remedy. Section 6(d) of WELSA provides:

> This section shall not bar an heir, allottee, or any other person entitled to compensation under this Act from maintaining an action * * * against the United States in the Claims Court pursuant to the Tucker Act, section 1491 of Title 28, United States Code * * *.

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[5] The takings clause of the Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power," the obligation to pay just compensation. *First English Evangelical Lutheran Church* v. *County of Los Angeles,* 482 U.S. 304, 314-315 (1987).

The legislative history of WELSA confirms that the Tucker Act remedy was included "to remove any risk that a court might hold it unconstitutional" (131 Cong. Rec. 36,248 (1985)):

> S. 1396 has addressed the taking issue by explicitly providing * * * a Tucker Act remedy to any person entitled to just compensation for the loss of his property.

Ibid.

Hence, claimants who are dissatisfied with the administratively determined compensation can sue the United States in the Claims Court for just compensation for any taking that may have occurred.[6]

3. Nor is there merit in petitioners' contention (Pet. 33-37) that WELSA impermissibly restricts the Tucker Act remedy. The specification of a time period in which claimants may use the Tucker Act remedy does not undermine the implied promise to pay for any taking that may result from WELSA. Rather, claimants simply must file their Tucker Act suit six months after an administrative determination of the compensation due them.

The district court, affirmed by the court of appeals, properly found this period to be a reasonable one. The district court recognized that because of the timing of the administrative determination, petitioners would, in fact, almost certainly have in excess of six years from the date of the alleged taking in which to file suit, which is more than plaintiffs normally have to file other Tucker Act complaints. Pet. App. A42. Moreover, as the court of appeals found, Congress by enacting WELSA alerted White

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[6] The fact that petitioners may prefer direct access to the Tucker Act remedy rather than resort first to the administrative remedy authorized by the Act does not mean that the Act effects an uncompensated taking or is otherwise unconstitutional.

Earth Band members that the Secretary would be determining the value of their claims over several years, and the Secretary is directed by the statute to notify claimants of that determination before the six-month time period for claims is triggered. In this context, the notice provided by the Secretary makes the six-month period as meaningful as a longer, six-year period without notice. Pet. App. A13. This is particularly true because the availability of a factual record generated by the administrative process is likely to enable a claimant to bring an action far more swiftly than a typical Tucker Act claimant. Pet. App. A42-A43. Accordingly, the courts below properly upheld the statutory period in which petitioners may file a Tucker Act claim as a reasonable one; that ruling does not warrant further review by this Court.

Nor does WELSA impermissibly burden the making of a Tucker Act claim by requiring forfeiture of administratively determined compensation when a Tucker Act claim is filed. See Pet. 34-35. The forfeiture provision prevents double recovery. Moreover, because those opting for Claims Court relief retain a full remedy for their taking claims, the amount forfeited is simply a congressionally provided gratuity.[7]

4. In any event, the administratively determined compensation authorized by the statute is fully adequate (indeed, more than adequate) for the uncertain causes of action at issue in this case. The claims against third parties that were extinguished if suit was not brought within 23 months after enactment of WELSA were "untested and of unknown legal value." 132 Cong. Rec. 4215 (1986). It was

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[7] Nor is the Tucker Act remedy burdened because petitioners are required to prove a taking claim as it applies to a "particular allotment or interest." 25 U.S.C. 331 note (Section 6(d)) (Supp. V 1987). This is the burden that any plaintiff with a taking claim would have.

recognized that they were not "proven entitlements" and that many of them rested on "questionable legal grounds." 131 Cong. Rec. 36,233 (1985).

Notwithstanding the speculative nature of the claims against third parties, Congress authorized compensation for all allottees and heirs dispossessed by the transactions described in Section 4(a) of WELSA. It provided for payment for the value of the lands when a claimant was dispossessed, with compound interest from the date the property left Indian possession, obviating any consideration of whether the transaction which led to the dispossession was, in fact, legally valid. No discounting is to be made for the litigative risk, expense, or the speculative nature of the causes of action for property or damages against third parties. In the past, compensatory damages for a lost allotment have been viewed as providing the full monetary equivalent, when an award rests on the land's value at the time it was lost with interest at a reasonable rate. See *United States* v. *Creek Nation,* 295 U.S. 103, 109-111 (1935). Here, the allottees or their heirs will receive compensation for the lost property, plus the loss of use value of the monetary equivalent in interest.[8]

In sum, given the complex and doubtful nature of the claims, Congress's judgment to provide for administratively determined compensation must—on its face—be deemed a valid effort to provide just compensation. See, *e.g., United States* v. *Sioux Nation,* 448 U.S. 371, 416-417

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[8] Claimants receive 5% compound interest. 25 U.S.C. 331 note (Section 8(a)) (Supp. V 1987). The same interest rate without compounding has been used in other Indian claims (see *United States* v. *Creek Nation*, 295 U.S. 103, 111-112 (1935)), and it is certainly a fair equivalent interest rate since the rates of interest even in the 1960's were often below 5%. See, *e.g., Pitcairn* v. *United States*, 547 F.2d 1106, 1120-1121 (Ct. Cl. 1976).

(1980). That effort is underscored by the availability of a Tucker Act remedy. The Constitution requires no more.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**
RICHARD B. STEWART
Assistant Attorney General
ROBERT L. KLARQUIST
EDWARD J. PASSARELLI
Attorneys

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* The Solicitor General is disqualified in this case.

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